Supreme Court, U.S.
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No. 96-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CAROLEE A. MEDICO,

Petitioner,

v.

CHARLES P. MEDICO, LAWRENCE MACDONALD, PATRICK J. TOOLE, JR., THOMAS A. MAKOWSKI, SUSAN LATONA, CHESTER MUROSKI, CORREALE STEVENS, DONALD O'MALLEY, CATHERINE DAVIS, SANDOR YELEN, MAXINE WILLIAMS, HUGH F. MUNDY, EUGENE DUFFY, ANTHONY TERRACCIANO, FIRST FIDELITY BANK, N.A., PENNSYLVANIA, ROBERT E. COLVILLE, MICHAEL J. DiMARCO and DONALD D. DOLBIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTHONY TERRACCIANO, FIRST FIDELITY BANK, N.A., PENNSYLVANIA, and MICHAEL J. DiMARCO

John E. McKeever*
Jennifer DuFault James
Attorneys for Respondents First Fidelity Bank, N.A., Anthony Terracciano, and Michael DiMarco
*Counsel of Record

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2000
Of Counsel.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court below properly affirm the district court's dismissal with prejudice of an amended complaint for failure to state a claim upon which relief could be granted, where the amended complaint did not differ in any material respect from the original complaint as to those defendants, where plaintiff was given an opportunity to further amend her complaint but did not do so, and where plaintiff has never specified the substance of the additional allegations she would set forth as to those defendants in any further amended complaint?

STATEMENT OF THE PARTIES

First Union Corporation is the parent of respondent First Fidelity Bank, N.A., Pennsylvania, which is now known as First Union National Bank.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
STATEMENT OF THE PARTIES	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI	3
CONCLUSION	5

TABLE OF AUTHORITIES

Page

CASES

Haines v. Kerner, 404 U.S. 519 (1972) 4

Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970) 4

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 3

STATUTES

18 U.S.C. §§ 1961-1968 1

42 U.S.C. §§ 1982 1

42 U.S.C. § 1983 1

42 U.S.C. § 1985 1

42 U.S.C. § 1986 1

42 U.S.C. § 1988 1

COUNTERSTATEMENT OF THE CASE

Petitioner Carolee Medico initiated this action on May 26, 1995, against her estranged husband, Charles Medico; Mr. Medico's attorney, Lawrence MacDonald; several judges in the Pennsylvania Court of Common Pleas of Lackawanna County (respondents Donald Dolbin, Hugh Mundy and Patrick Toole); and First Fidelity Bank, N.A., Pennsylvania and Anthony Terracciano (an officer of First Fidelity).[1] She alleged violations of 42 U.S.C. § 1983 and § 1985, and the Fourteenth Amendment to the Constitution of the United States.

After First Fidelity and Mr. Terracciano moved to dismiss petitioner's complaint, setting forth in detail its deficiencies as to them, petitioner filed an amended complaint. The amended complaint named eleven additional defendants, including Michael DiMarco, Esquire, an attorney who had represented First Fidelity in a mortgage foreclosure action brought against Ms. Medico and her estranged husband.[2] In addition to the claims under §§ 1983 and 1985, the amended complaint purported to set forth claims under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 to 1968 ("RICO"), 42 U.S.C. §§ 1982, 1986 and 1988, and the First, Fourth, Fifth, Sixth, and Thirteenth Amendments to the Constitution.

With regard to the First Fidelity respondents, the amended complaint alleged that First Fidelity and Mr. Terracciano, on behalf of First Fidelity, extended a mortgage to Mr. Medico on the marital home that he shared with petitioner; that First Fidelity and Mr. Terracciano "joined together" with Mr. Medico to keep petitioner unaware that he had failed to make payments on the mortgage for several years; that First Fidelity brought a foreclosure action against the Medicos for nonpayment of the mortgage; and that in the course of the proceedings in the foreclosure action, Mr. DiMarco (First Fidelity's attorney) contacted certain judges in the Pennsylva-

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1. Since the district court entered the orders from which Ms. Medico appeals, First Fidelity Bank, N.A., Pennsylvania, has become First Union National Bank.

2. First Fidelity, Mr. Terracciano and Mr. DiMarco are referred to herein collectively as "the First Fidelity respondents."

nia Court of Common Pleas concerning scheduling of hearings, with copies of his letters sent to petitioner. These allegations were identical in every respect to the allegations that petitioner made against the First Fidelity respondents in her original complaint. Despite having the benefit of the arguments set forth by the First Fidelity respondents as to the deficiencies in her complaint, petitioner did not take the opportunity to correct those deficiencies in the amended complaint, which did not include even one new or revised allegation against the First Fidelity respondents.[3]

Nowhere in the amended complaint did petitioner allege that the First Fidelity respondents were agents of any governmental entity, that they performed functions generally associated with government or delegated to them by government, or that they received any funds from government.

All defendants, including the First Fidelity respondents, moved to dismiss the amended complaint. Following a telephonic case management conference on November 25, 1995, in which petitioner and counsel for all defendants participated, the district court entered an order providing that "no amended complaint shall be filed except upon leave of court." Petitioner never sought leave to file a second amended complaint, nor did she ever specify to the Court or any party what additional allegations she would include in such a complaint.

On February 1, 1996 — more than two months after the case management conference — the district court entered an Opinion and Order dismissing, with prejudice, the amended complaint as to all defendants, including the First Fidelity respondents. The court determined, *inter alia,* that the amended complaint failed to state a claim as to the First Fidelity respondents under § 1983. By Order dated April 10, 1996, the district court denied petitioner's motion for reconsideration. The district court explicitly addressed and rejected Ms. Medico's contention that it was error for the court to dismiss the amended complaint because she was proceeding *pro se*

3. Although Mr. DiMarco was added as a defendant in the amended complaint, the allegations referring to him were identical to those referring to him in the original complaint.

and therefore should have been given an opportunity to amend the amended complaint.

On appeal to the court below, petitioner did not argue any claims but those asserted under § 1983. She also did not challenge in her briefs the district court's dismissal of the First Fidelity respondents. On February 6, 1997, the court below entered a judgment order affirming the district court's dismissal of petitioner's amended complaint.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

This case presents no issue worthy of *certiorari.* Petitioner's only stated ground for *certiorari* is her disagreement with the district court's decision to dismiss the amended complaint without allowing her unlimited time in which to seek leave to file yet another amended complaint. This is not an issue requiring review by this Court.[4] That issue is a well-settled matter of civil procedure, as to which there is no conflict between the decision of the court below and the precedents of any other Court of Appeals or of this Court. The district court's decision to grant or deny leave to file successive amendments under Rule 15(a) of the Federal Rules of Civil Procedure is a matter of discretion, and its refusal to permit additional amendments is reversible only if that discretion was abused. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330 (1971). The circumstances of this case demonstrate that the district court exercised its discretion properly.

The premise of the petition for *certiorari* is Ms. Medico's belief that she was entitled to yet another bite at the apple before the district court dismissed her action. At least as to the First Fidelity respondents, that premise is flawed. With the benefit of knowing the arguments relied upon by the First

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4. Petitioner bases her argument on Rule 15(a) of the Federal Rules of Civil Procedure and on the abstention doctrine. The First Fidelity respondents did not raise an abstention argument below, and accordingly confine their argument here to the Rule 15(a) issues.

Fidelity respondents in their motion to dismiss the original complaint, Ms. Medico had every opportunity to include in the amended complaint that she did file new allegations against them that might have stated a claim. Yet, even with that benefit, she did not alter or supplement in any way the allegations as to the First Fidelity respondents. While leave to amend "shall be freely given when justice so requires," Rule 15(a) does not contemplate permitting endless, fruitless amendments.

Petitioner relies almost exclusively on her status as a *pro se* litigant in arguing that she was entitled to more than her fair share of amendments, citing *Kauffman v. Moss,* 420 F.2d 1270 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970). However, the dismissal at issue in *Kauffman* was of an original complaint that had never been amended. *Kauffman* is of no assistance to petitioner, who *did* amend her complaint and was offered, *but did not act on,* an additional opportunity to do so again. While a *pro se* complaint must be construed liberally, *see Haines v. Kerner,* 404 U.S. 519, 520 (1972), that does not mean that a *pro se* plaintiff such as petitioner may maintain an action where she has utterly failed on at least two occasions to allege essential elements of the claims she seeks to assert. Such is the case here. The district court properly dismissed the amended complaint for failure to state a claim after fully taking into account Ms. Medico's status as a *pro se* litigant, liberally construing the amended complaint, and giving her every opportunity further to amend the amended complaint and at the very least to describe with some degree of specificity her proposed amendments. Its holding, and the affirmance of the court below, is entirely consistent with this Court's precedents.

Ms. Medico has not raised in her petition any issues relating to the substance of her amended complaint or the propriety of the district court's dismissal for failure to state a claim on which relief may be granted. Nor has she stated how she would further amend her amended complaint to state a claim against the First Fidelity respondents. Her petition is limited to procedural arguments only. Accordingly, she has failed to

preserve her arguments on the substance of any of the district court's holdings, affirmed by the court below, as to the merits of her claims.

CONCLUSION

For the foregoing reasons, the First Fidelity respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

John E. McKeever
Jennifer DuFault James
Attorneys for Respondents
Anthony Terracciano,
First Fidelity Bank, N.A.,
Pennsylvania, and Michael DiMarco

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2000
Of Counsel.

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